In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner asserts that his order to report for induction was unlawful because it was issued after he had been declared delinquent, allegedly in violation of the principles enunciated in *Gutknecht* v. *United States*, 396 U.S. 295. He also claims that his motion under 28 U.S.C. 2255 to vacate his sentence should have been granted because his substantive contention, previously rejected by the court of appeals, was thereafter accepted in a different case by another panel of the same court.

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of having failed to report for induction in July 1967, in violation of 50 U.S.C. App. 462, after he had been declared delinquent for failure to report for earlier physical examinations. He was sentenced

to three years' imprisonment. The court of appeals remanded the case to the district court "without limitation of scope but especially for consideration of the case in the light of the intervening decision of Gutknecht v. United States, 396 U.S. 295" (432 F. 2d 1009; Pet. App. 1a). Following an evidentiary hearing, the district court found that petitioner's induction order had not in fact been accelerated because of his delinquency status, and that *Gutknecht* was therefore inapplicable; it accordingly declined to set aside the earlier conviction (Pet. App. 7a-10a). The court of appeals then affirmed *per curiam* (447 F. 2d 1376; Pet. App. 11a).

While a petition for a writ of certiorari was pending in this Court, a different panel of the court of appeals decided *United States* v. *Fox*, 454 F. 2d 593, which held on facts similar to those in this case that under Selective Service regulations the induction order was invalid as a matter of law if it followed a failure to report for a physical examination and an ensuing delinquency determination. In our Supplemental Memorandum in Opposition, we acknowledged that *Fox* was inconsistent with the earlier decision in this case, but we nevertheless urged that certiorari be denied, because (1) the earlier decision was, in our view, the correct one, (2) the conflict was only within the Ninth Circuit and presumably would be resolved by that court in later cases, and (3) the issue was not of continuing importance since the pertinent regulations had been amended to make clear that a registrant's failure to report for a physical examination would not preclude a timely order to report for induction (p. 2). This Court denied certiorari on February 22, 1972 (405U.S. 933; Pet. App. 13a).

Nearly two months later, petitioner filed in the court of appeals a "Motion for Extension of Time in Which

to File a Petition for Rehearing." The court of appeals, noting that certiorari had been denied on February 22, 1972, and that the motion "was not tendered for filing in this court until the 19th day of April, 1972," rejected the tender and ordered the clerk to return the motion to petitioner (Pet. App. 14a).

Petitioner thereafter filed the present motion under 28 U.S.C. 2255, raising the same issues that had previously been adjudicated against him and urging that the intervening *Fox* decision required that his sentence be vacated. The district court denied the motion (Pet. App. 15a-17a), and the court of appeals affirmed (472 F. 2d 596; Pet. App. 18a-19a). The court of appeals held (1) that *Fox* had not overruled the earlier panel decision in this case, (2) that petitioner could not, in any event, relitigate collaterally issues already decided against him on direct appeal, and (3) that the rule permitting relitigation where there has been an intervening change in the law "is not applied in this circuit under circumstances such as here presented" (Pet. App. 19a). Petitioner did not seek rehearing or rehearing *en banc*.

1. With respect to petitioner's argument that the writ should be granted because the original panel decision conflicts with *Gutknecht* and with *Fox* (Pet. 14-21), we rely upon our previous Memorandum and Supplemental Memorandum in Opposition (No. 71-661, O.T. 1971), which set forth the relevant facts and answered petitioner's underlying contentions.[1] In our view, the issue

[1] Petitioner's assertion that the court of appeals "has repeatedly declined to resolve the conflict" (Pet. 14) apparently refers only to the original panel's refusal to consider a petition for rehearing tendered almost two months after certiorari was denied on direct appeal, and to the unwillingness of a different panel to permit relitigation of issues finally resolved in the earlier appeal. There is no reason to think that the court would not consider the issue

is of no continuing importance in view of the amendments to the pertinent regulations which formed the basis for the courts' rulings. It is impossible to speculate how many untried indictments there may be involving fact situations similar to the one in this case, but we submit that the court's holding on direct appeal—that the *Gutknecht* principles do not apply—is so clearly correct that there is little reason for this Court to pass upon the so-called defense at this time.[2]

2. Petitioner also contends that, by holding that he may not relitigate issues decided on direct appeal, the decision below conflicts with this Court's decisions in

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en banc if it were timely presented in another case. Indeed, there is no reason to assume the court would not have reheard *this* case *en banc* had petitioner sought such a rehearing.

[2] The cases cited by petitioner as reflecting an inter-circuit conflict are not really in conflict with the decision below (Pet. 19-21). The record in *Battiste* v. *United States*, 428 F. 2d 801 (C.A. 5), contrary to the record here, made it "unequivocally clear that the induction order was based not upon the normal sequence of call but upon appellant's delinquency status" (428 F. 2d at 802). Similarly, in *United States* v. *Dobie*, 444 F. 2d 417 (C.A. 4), the registrant had a deferment before he was declared a delinquent, and even if he had reported as ordered for a preinduction physical examination, it was "equally probable" that he would have been continued in his deferred status rather than ordered for induction as soon as he was (444 F. 2d at 421). Here, petitioner was at all times "properly classified 1-A and was not entitled to any deferments or exemptions" (Pet. App. 9a), and the district court found that if he had reported for his scheduled physical examination, he would have been ordered for induction eight months before he was (Pet. App. 8a).

Petitioner asserted the same inter-circuit conflicts in his earlier petition for certiorari, and we responded fully in our Memorandum in Opposition (pp. 6-8). Even if there were a conflict, it would involve not the decision at issue here but the decision on direct appeal, with respect to which this Court denied certiorari in February 1972.

Kaufman v. *United States,* 394 U.S. 217, and *Sanders* v. *United States,* 373 U.S. 1. Neither case is in point.

Kaufman held that a Fourth Amendment claim could be raised in a collateral proceeding even though it was not, but could have been, raised on direct appeal. The Court did not consider whether a similar rule would apply to statutory or regulatory, as opposed to constitutional, claims, nor whether it would apply where the claim had already been adjudicated on direct appeal.[3]

In *Sanders* the issue was whether an application for collateral relief may be denied solely because the issue was not, but could have been, raised in an earlier application. This Court held that an application may be denied on the basis of a prior denial only if the same ground was previously determined on the merits adversely to the applicant and "the ends of justice would not be served by reaching the merits of the subsequent application" (373 U.S. at 15). As an example of when "the ends of justice" might be thus served, the Court stated: "If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an

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[3] The Court quoted from and adopted the reasoning of the dissenting opinion in *Thornton* v. *United States,* 368 F. 2d 822 (C.A. D.C.) (394 U.S. at 230-231). The quoted passage contained a suggestion, upon which petitioner relies here, that it might be appropriate for a court to reconsider collaterally a constitutional claim raised and previously decided, "if new law has been made or facts uncovered relating to the constitutional claim" since the appeal. Even this dictum, however, was directed only to constitutional claims and to intervening changes in the law. The claim here relates to the interpretation of Selective Service regulations, and the *Fox* decision, though inconsistent with the original decision in this case, did not overrule it and did not have the determinative effect of an *en banc* decision or of a decision of this Court. Whether this would be "new law" under the *Thornton* dissent is unclear.

intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application" (*id.* at 17). The Court apparently had in mind a case in which the prior application has been decided on the merits and on the same "ground" advanced subsequently, but an intervening change in law has suggested a new legal "argument."[4] In those circumstances, the ends of justice might well be served by considering the new arguments. Here, however, *Fox* did not suggest, and petitioner has not presented, any new legal arguments justifying the application of the *Sanders* rule.

Petitioner urges, in effect, that whenever there is a change in the law, any person who was adversely affected by the prior law is entitled to the advantages of the change by way of collateral relief. Neither *Kaufman* nor *Sanders* establishes such a broad rule of automatic and universal retroactivity, and the court of appeals properly refused to adopt it. Indeed, this Court's numerous decisions dealing with the question *whether* newly announced or developed constitutional principles should be applied retroactively demonstrate that entitlement to the benefit of an intervening change in law is hardly automatic.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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[4] The Court carefully distinguished between a new "ground" for relief, which would entitle an applicant to a new hearing, and a new "argument" relating to the same ground, which ordinarily would not entitle one to a new hearing (373 U.S. at 16).

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